

Broadcasting and Telecommunications

Section Q of Stikeman Elliott's *Doing Business in Canada*





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Broadcasting and Telecommunications

GENERAL

The federal government has exclusive jurisdiction over broadcasting (radio, television and their distribution, including some Internet activity) and telecommunications. The *Canadian Radio-television and Telecommunications Act* establishes the Canadian Radio-television and Telecommunications Commission (CRTC) as Canada's broadcasting (pursuant to the *Broadcasting Act*) and telecommunications (pursuant to the *Telecommunications Act*) regulator. The federal Department of Industry and its Minister have certain regulatory powers over spectrum management and radio apparatus pursuant to the *Radiocommunication Act*.

BROADCASTING AND THE CRTC

General

The CRTC is charged under the *Broadcasting Act* with regulating and supervising all aspects of the Canadian broadcasting system with a view to implementing the policy enunciated in section 3(1) which includes the requirement that the Canadian broadcasting system be effectively owned and controlled by Canadians and should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

Subject to directions from the Governor in Council and the *Radiocommunication Act*, the CRTC is empowered under the *Broadcasting Act* to issue, attach conditions to, amend, renew, suspend and revoke broadcasting and broadcasting distribution licences, establish rules of procedure, make regulations and carry out and support research. The CRTC has rarely failed to renew a broadcasting licence.

Range of Regulatory Power

The CRTC has responsibility for radio, television, pay television, specialty services and broadcasting distribution undertakings, such as cable television, direct-to-home (DTH) satellite and wireless distributors. The Commission has enacted regulations applicable to each of these sectors, in addition to regulations prescribing the filing of information returns and the payment of licence fees.

Exemption Orders

The CRTC also has the power to issue exemption orders, thereby exempting persons from any or all of the requirements of Part II of the *Broadcasting Act* where compliance will not contribute in a material way to the implementation of broadcasting policy. In December 1999, for example, the

Commission exempted from regulation new media broadcasting undertakings that operate in Canada. A new media broadcasting undertaking is an entity that provides broadcast services exclusively on the Internet. In June 2002, the Federal Cabinet issued a directive to the CRTC requesting the Commission to conduct a public proceeding and report back on the broadcasting regulatory framework for persons who retransmit television and radio signals over the Internet and the appropriateness of amending the New Media Exemption Order. In its January 17, 2003 report to Cabinet, the CRTC decided that the New Media Exemption Order will continue to apply to these so-called Internet retransmitters.

Consistent with its general practice of reviewing exemption orders every five to seven years, the CRTC launched a review of the New Media Exemption Order in March 2007. Since that time, the CRTC's Policy Development and Research Sector has been studying the new media environment. By March 2008, the CRTC is expected to issue a report with recommendations on whether it should regulate new media, and with suggested regulations and methods of implementation if it determines that new media should be subject to CRTC regulation.

Restrictions on Foreign Ownership

Pursuant to section 26(1) of the *Broadcasting Act*, the Governor in Council has the discretionary power to issue binding directions to the CRTC. A Cabinet direction has been issued prohibiting the issuance and the granting of broadcasting licence renewals to governments other than the Government of Canada and to persons who are not Canadian citizens or "eligible Canadian corporations". In summary, in order to be a "qualified corporation," eligible to be licensed, a company must be incorporated or continued in Canada or a Canadian province. In addition, the CEO and at least 80% of the directors must be Canadians, Canadians must own and control at least 80% of all voting shares and votes, and the company must not be "controlled in fact" by non-Canadians. In the case of a company that is a subsidiary of another, the parent must also be incorporated in Canada or a province and Canadians must own at least two-thirds of the parent company's voting shares and at least two-thirds of the votes. Neither the parent company nor its directors or similar officers may exercise control or influence over any programming decisions of the subsidiary. There are no specific restrictions on the number of non-voting shares that may be owned by non-Canadians; however, there is an overriding control in fact test whereby an applicant seeking to acquire, amend, or renew a broadcasting licence must not otherwise be controlled in fact by non-Canadians. This is a question of fact determined by the CRTC in its discretion.

The House of Commons Standing Committee on Canadian Heritage conducted a wide-ranging study of the Canadian broadcasting system, including the future regulatory role of the CRTC, and recommended to the

Minister of Canadian Heritage in 2003 that the existing foreign ownership restrictions applicable to the Canadian broadcasting industry be retained. A separate study of Canada's telecommunications industry, by the Standing Committee on Industry, Science and Technology, reported to the Industry Minister (also in 2003), recommending the discontinuance of foreign ownership restrictions applicable to telecommunications carriers (i.e. facilities based telecommunications service providers) and to broadcasting distribution undertakings, such as cable and DTH satellite service providers. The federal government released a response to the report of the House of Commons Standing Committee on Canadian Heritage in April 2005 stating, among other things, that "the Government wishes to indicate that it is not prepared to modify foreign ownership limits on broadcasting or content more generally".

At the same time, the Government noted the appointment by Industry Canada of an independent panel of experts, the Telecommunications Policy Review Panel, to review Canada's telecommunications policy and regulation of telecommunications. One of the many terms of reference for this Panel included consideration of Canada's foreign investment restrictions in telecommunications and whether they should be removed.

The Panel's report, published in March 2006, recommended that foreign ownership restrictions should remain on telecommunications firms which are also licensed broadcasters pending completion of a proposed broadcasting policy review. The Panel noted that increased competition from foreign companies in the telecommunications sector would likely improve economic efficiency and boost domestic competitiveness and productivity. However, because companies with both broadcasting and telecommunications operations (so-called "broadcasting distribution undertakings", or BDUs) are subject to *Broadcasting Act* ownership restrictions similar to those currently in the *Telecommunications Act*, BDUs would still face foreign ownership restrictions even if the *Telecommunications Act* restrictions were lessened or lifted entirely. This would mean that if *Telecommunications Act* restrictions were changed, BDUs would likely face unfair competition from telecommunications companies that did not have broadcasting operations, as those companies could enjoy the benefits of transferring ownership while BDUs could not.

That being said, the Panel felt that it was possible to have a "phased and flexible" liberalization of foreign ownership restrictions on telecommunications companies. The Panel recommended a two-phase approach to ownership liberalization. In the first phase, the *Telecommunications Act* would be amended to give the federal Cabinet the right to waive foreign investment restrictions when it deemed an investment or class of investments to be in the public interest. Also in the first phase, there would be a presumption that investments in telecommunications start-up companies, or investments in telecommunications companies with

less than 10% market share, would be in the public interest. In the second phase, which would occur after the proposed broadcasting policy review had been completed, the Panel recommended that broader liberalization of foreign investment rules take place. In this phase, the “carriage” business conducted by BDUs would be opened up to foreign investment. The focus of any Canadian ownership restrictions would then be limited to broadcasting “content” businesses. Implementation of these recommendations will require amendments to legislation such as the *Telecommunications Act*. The current government has indicated that no amendments to change foreign ownership provisions will be proposed as long as there is a minority Parliament.

Canadian Content

Another key element of the broadcasting policy set out in section 3(1) of the *Broadcasting Act* is the “creation and presentation of Canadian programming” and the “maximum use and in no case less than predominant use, of Canadian creative and other resources”. This has led to CRTC regulations requiring licensees to maintain a specified percentage of Canadian content in their radio and television programming.

On July 5, 2007, the CRTC announced a public review of regulatory frameworks pertaining to BDUs and discretionary program services (*Broadcasting Notice of Public Hearing – CRTC 2007-10*). This Review will assess whether current regulations are sufficient to ensure adequate levels of Canadian content. Specifically, the CRTC “seeks comment on how [Canadian] programming obligations of pay and specialty services should be balanced with providing greater competition among programmers and more flexibility for BDUs with respect to the distribution of programming services.”

The CRTC has also asked participants to consider the recent review by Laurence Dunbar and Christian Leblanc of the Canadian broadcasting regulatory framework (the “Dunbar/Leblanc Report”). Though the report acknowledges “the importance of the Canadian broadcasting system to Canada’s cultural identity”, it was controversial (particularly with existing Canadian broadcasters with a vested interest in the status quo) insofar as it recommended ending genre protection among Canadian programming services, creating greater flexibility and selection of programming bundles, and ending certain advertising restrictions. Dunbar and Leblanc argue for relaxed restrictions on Canadian content, suggesting that only 51% of packages consist of Canadian programming. However, the authors also argue that current regulations and incentives for Canadian programming are insufficient. Noting that entertainment magazines and reality shows often fill Canadian content requirements, Dunbar and Leblanc advocate for increased targeted incentives for Canadian drama. Interested parties had the opportunity to file written submissions with the CRTC in October and

November 2007. An oral public hearing will be held in February 2008. A decision from the CRTC is expected in or about June 2008.

Radio Frequency Spectrum Allocation

In addition to CRTC licensing, legislative provisions governing the allocation of the radio frequency spectrum and technical or “hardware” issues are prescribed in the *Radiocommunication Act*. The Minister of Industry is granted discretionary power under the *Radiocommunication Act* to regulate these technical aspects of broadcasting undertakings. The CRTC requires applicants for broadcast licences to confirm they have filed technical documents with Industry Canada concerning transmitter/antenna and related information.

TELECOMMUNICATIONS

General

The *Telecommunications Act* responds in part to the Supreme Court of Canada’s determination that jurisdiction over telecommunications common carriers rests exclusively with the federal government. For many years the question of jurisdiction had been unsettled, leading to an awkward mix of federal, provincial and even municipal regulation. In 2000, Saskatchewan Telecommunications (SaskTel), owned by the Saskatchewan Government, became the last of Canada’s telephone companies to be brought under CRTC jurisdiction.

The *Telecommunications Act* is administered by the CRTC and requires the Commission to promote certain policy objectives, including the maintenance of Canada’s identity and sovereignty, Canadian ownership and control of telecommunications carriers operating or providing services in Canada, the efficiency and competitiveness of Canadian telecommunications, the stimulation of Canadian research and development, and the provision of services at reasonable rates in light of market forces.

Ownership

Under the *Telecommunications Act* and its associated regulations, telecommunications common carriers (i.e. the entities that own or operate facilities) must be Canadian owned and controlled. This requirement is satisfied if:

- a carrier is incorporated in Canada (either federally or provincially);
- 80% or more of the members of the carrier’s board of directors are Canadian;
- not less than 80% of the carrier’s voting shares are beneficially owned by Canadians; and
- the carrier corporation is not otherwise controlled by non-Canadians.

Regulations enacted under the *Telecommunications Act* have established a holding company arrangement with the effect of permitting foreign investment up to a level of 46.7% based upon 20% direct investment plus 33 1/3% indirect investment. There can be 100% foreign ownership of telecommunications entities that do not own facilities (e.g. resellers of telecommunications services).

Tariffs

Unless otherwise exempted or forborne, the provision of telecommunications services by a carrier will be subject to conditions included in a tariff approved by the CRTC. Such tariffs will specify the terms and conditions for the service as well as the rates to be charged. The CRTC will approve rates if it determines that they are just, reasonable and non-discriminatory.

The *Telecommunications Act* allows the CRTC to refrain from exercising its normal regulatory powers (forbearance) where it is of the view that the forces of competition will suffice to ensure reasonable rates and prevent discriminatory practices with respect to a class of telecommunications services. Traditionally, forbearance was treated as only one policy option of many available to the CRTC, though in recent years, the CRTC has forborne substantially from the regulation of wireless, long distance, satellite, international and retail Internet services.

Furthermore, a major policy shift has occurred over the past year. In December 2006, forbearance became the CRTC's default option, when the Government of Canada issued a policy directive stating that the CRTC should use market forces instead of regulation whenever possible. In April 2007, an Order-in-Council was passed establishing a presence-based test to be used by the CRTC to determine whether certain markets should be deregulated. As a result, it has been estimated that soon a majority of retail telephone customers will rely on competition rather than regulation to determine prices.

The CRTC also has the power to exempt a class of carrier from the application of the *Telecommunications Act* if it is satisfied that the exemption is consistent with Canadian telecommunications policy objectives. The CRTC preference has been to issue conditional forbearance orders rather than exemption orders and to maintain a power to review alleged discriminatory practices.

In 2002 and 2003, the CRTC issued a series of decisions directed at fostering greater competition in the Canadian telecommunications sector. These included revising the form of price cap regulation applicable to ILECs, rules governing the provision of telecommunications services by affiliates of ILECs and determinations addressing promotions and winback schemes. The Commission remained consistent to this approach in its landmark decision addressing the regulatory framework for Voice over Internet Protocol

(VoIP) released on May 12, 2005. In this decision, the Commission found that VoIP is a close substitute for traditional local phone service and that VoIP services should be regulated as local exchange service according to previous CRTC determinations governing local competition. As a result, rules restricting winback, promotion and bundling activities of the ILECs as well as requirements for ILECs to file tariffs for prior approval before offering VoIP services were implemented. This decision was designed in large part to help smaller telecom companies enter the VoIP market, by restricting the larger carriers' ability to compete directly with them.

However, the May 2005 decision was overturned by the Government on November 15, 2006. At that time, the then Minister of Industry Canada directed the CRTC to refrain from the economic regulation of VoIP. This order, later adopted by the CRTC, effectively allows large telecommunications companies such as Bell and TELUS to compete head-to-head with smaller providers.

The CRTC is also given broad inspection, investigation and enforcement powers. Contravention of the *Telecommunications Act* can result in civil and criminal liability carrying fines of up to \$1 million. However, the CRTC itself does not have the power to fine telecommunications carriers or service providers for a breach of the *Telecommunications Act* or of the Commission's decisions or orders. In the 2005 Federal Government budget plan, the Government indicated its intention to amend the *Telecommunications Act* to give the CRTC a general fining power. Bill C-73, *An Act to Amend the Telecommunications Act (No. 2)*, received First Reading on November 14, 2005. However, the Bill died on the order paper shortly thereafter.

Additionally, Bill C-37, *An Act to Amend the Telecommunications Act*, which came into force June 30, 2006, includes a fining power in proposed amendments respecting the implementation and administration of a "do not call list" by the Commission.

Telecommunications Policy Review

On April 11, 2005, the Minister of Industry Canada appointed a Telecommunications Policy Review Panel to conduct a review of Canada's telecommunications policy and regulatory framework. The Panel was asked to make recommendations on a number of issues including how to move Canada toward a modern telecommunications framework in a manner that benefits Canadian industry and consumers.

As mentioned earlier, the Panel released its findings in March 2006. Further to the foreign ownership issues already discussed, the Panel's 400-page report made 127 recommendations. A major focus in the Panel's findings is on further deregulation of the telecommunications sector. The Panel suggests maximizing the role of market forces in determining rates

and limiting regulation to areas where market forces cannot ensure affordable access to telecommunications. It also calls for the *Telecommunications Act* to affirm consumer rights to Internet access, for the creation of an industry-funded “Telecommunications Consumer Agency” to act as ombudsman for industry-related complaints, for the establishment of a joint CRTC-Competition Bureau tribunal to deal with competition issues in a more flexible manner than the current regulatory regime permits, and for an initiative to promote advanced Information and Communications Technologies (ICTs) in the public and private sectors.

Effect of Free Trade Agreements

The primary effect of the FTA and NAFTA on the communications industry has been in the area of “enhanced” or “value-added” telecommunications. Neither the FTA nor NAFTA applies generally to basic point-to-point telecommunications or to broadcasting, although NAFTA does restrict certain activities of national basic telecommunications service monopolies as a means of ensuring that they do not engage in anti-competitive behaviour.

Unlike the FTA, which left the issue of what qualifies as an “enhanced” service to be determined by the regulatory body of each country, NAFTA specifically defines “enhanced or value-added services” as telecommunications services that use computer processing applications that:

- act upon the format, content, code, protocol or similar aspect of a customer’s transmitted information;
- provide a customer with additional, different or restructured information; or
- involve customer interaction with stored information.

Thus, enhanced services include most services beyond basic and long-distance telephone services — for example, electronic mail, on-line information and data retrieval or processing, and even alarm systems.

Each NAFTA country is required to give other NAFTA countries’ carriers and providers of “enhanced or value-added services” the better of national treatment (no less favourable than treatment granted carriers of its own country) and most-favoured-nation treatment (no less favourable than treatment granted carriers of any other country). However, NAFTA countries may nonetheless maintain licensing schemes in respect of such services on reasonable and non-discriminatory terms. NAFTA also requires equal access to public telecommunications networks. Notably, NAFTA countries are not allowed to restrain trade by imposing discriminatory rules regarding the attachment of terminal equipment (or any other equipment) to public telecommunications transport networks.

Telecommunications covered by NAFTA are also subject to the general NAFTA rules respecting investment. Canada, like Mexico and the United States, has taken reservations that permit the retention and application of the Canadian ownership and control requirements described above.

General Agreement on Trade in Services (GATS)

Canada has signed the GATS agreement that brought basic telecommunications services under the authority of the World Trade Organization (WTO). This agreement establishes multilateral rules for trade and investment in basic telecommunications services and makes any breach of the agreement subject to the WTO dispute settlement process.

Under its GATS commitments, Canada maintained its existing open regulatory regime as well as its foreign ownership rules for common carriers. Canada also adopted a reference paper on regulatory principles that was consistent with its existing regulatory system. While broadcasting services and the transport of DTH and DBS satellite signals were excluded, Canada liberalized regulation relating to the provision of international services and domestic satellite services.

Canada has progressively removed traffic-routing rules for all international services and all satellite services. The last such rule ceased to apply as of March 1, 2000. The *Telecommunications Act* and the *Teleglobe Canada Reorganization and Divestiture Act* were amended in 1998 to provide for the licensing of submarine cables as well as to authorize the CRTC to put in place, for the first time, a licensing regime for international services.

The *Telecommunications Act* empowers the CRTC to require those falling into specified classes of basic telecommunications service providers to obtain licences to provide international telecommunications services. The new licensing power extends to resellers. The CRTC's licensing regime for Basic International Telecommunications Service (BITS) providers came into force on January 1, 1999. BITS licensees are not subject to foreign ownership restrictions.

RADIO SPECTRUM MANAGEMENT

Through powers conferred on the Minister of Industry Canada (that can be and are delegated) pursuant to the *Radiocommunication Act*, Industry Canada is responsible for managing and allocating radio frequencies used in broadcasting and telecommunications as well as licensing and regulating radio apparatus. Relative to spectrum management, Industry Canada has employed a traditional first-come, first-served (FCFS) licensing practice, complimented by a comparative selection and licensing process, auctions in appropriate circumstances as well as international and domestic frequency allocation processes.

The FCFS approach is generally used where there is sufficient spectrum to meet the demand in a given frequency band, while a competitive licensing process has been used in the cases of radio frequencies for which demand is likely to exceed supply (as well as occasionally for policy reasons).

Additionally, Industry Canada has increasingly assigned spectrum licences through public auctions. The following licence auctions have occurred in recent years:

- 24 and 38 GHz frequency bands: November 1999;
- PCS 2 GHz frequency band: January 2001; and
- 2300 MHz and 3500 MHz frequency bands: February 2004.

On February 16, 2007, the Minister of Industry Canada announced plans to hold public consultations relating to auctioning spectrum in the 2 GHz range, including spectrum for advanced wireless services. Under the Minister's plan, a total of 105 MHz of spectrum would be made available through an auction process which is expected to be held in Q1 or Q2 of 2008.

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